

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

<p>UNITED STATES OF AMERICA</p> <p>Plaintiff</p> <p>v.</p> <p>TROPICAL FRUIT, S.E.; AVSHALOM LUBIN; CESAR OTERO ACEVEDO; and PEDRO TOLEDO GONZALEZ</p> <p>Defendants</p>	<p>Civil Action No. 97-1442-DRD</p>
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SUR-REPLY TO PLAINTIFF'S MEMORANDUM IN REPLY  
TO THE HONORABLE COURT:

COME NOW defendants, Tropical Fruit, S.E., Avshalom Lubin, César Otero Acevedo and Pedro Toledo González (hereinafter referred to collectively as "Defendants" "Tropical Fruit" or "the Farm"), represented by the undersigned counsel, and very respectfully allege and pray:

1. On May 31, 2005, the Court granted Defendants request for leave to file a sur-reply to Plaintiff's *Memorandum in Reply to Defendants' Opposition to Motion for Order Requiring Defendants to Show Cause Why They Should not be Held in Contempt of and Ordered to Immediately comply with the Consent Decree* by today June 15, 2005. (Docket No. 113).

2. In its Reply (Docket No. 114), Plaintiff attempts to misguidedly shift its burden to the Farm, while misconstruing the arguments set forth in Defendants memorandum in support of the motion in compliance with order to show cause. In

summary, instead of providing any clear and convincing evidence of Tropical Fruit's alleged contemptuous behavior, as it is required to do as a movant of a motion for contempt, Plaintiff has incorrectly averred that Defendants' motion in compliance with order to show cause amounts to a request for the modification of the Consent Decree pursuant to Federal Rule of Civil Procedure 60(b). In the case at bar, it is clear that Plaintiff is the party who carries the heavy burden to establish, by clear and convincing evidence, the alleged contempt of Defendants with regard to the compliance with the terms of the Consent Decree. It is also evident that Plaintiff has not met its burden and that the case law cited by Plaintiff is inapposite to its motion for contempt.

3. Significantly, Plaintiff has failed to even address the facts set forth by the Farm in its memorandum of law in support of motion to show cause by which Tropical Fruit clearly demonstrated its diligent, good faith efforts to comply with the Consent Decree and the extent to which they have amounted to substantial compliance with the Consent Decree's overall mandate. Consequently, Plaintiff's motion for contempt should be denied.

4. Moreover, as discussed by Defendants in its motion in compliance with the Court's order to show cause and a memorandum of law in support thereof, (Docket No. 105), First Circuit law does not require "letter-perfect compliance [...] with the demands of the Consent Decree", in order to avoid a finding of contempt. Langton v. Johnston, 928 F.2d 1206, 1222 (1<sup>st</sup> Cir. 1991). Pursuant to the cited case, Plaintiff's motion for contempt should be denied, as requested by Defendants.

WHEREFORE, it is respectfully requested that this Honorable Court deny Plaintiffs' motion for Defendants to be held in contempt and ordered to immediately comply with the terms of the Consent Decree as interpreted by the EPA.

Respectfully submitted.

In San Juan, Puerto Rico, on this 15<sup>th</sup> day of June 2005.

I HEREBY CERTIFY that on June 15<sup>th</sup>, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Mr. Henry Friedman, Esq., Environmental Enforcement Section, U. S. Department of Justice, PO Box 7611, Washington, D. C. 20044; Isabel Muñoz, Assistant United States Attorney, Federal Building, Room 452 Chardon Avenue, Hato Rey, Puerto Rico 00918.

I HEREBY CERTIFY that I have mailed by United States Postal Service the foregoing document to the following non CM/ECF participants: German A. González P.O. Box 190764 San Juan, PR 00919-0764.

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